No. 17-16693

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ETOPIA EVANS, *ET AL.*,

Plaintiffs-Appellants,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *ET AL.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF DEFENDANTS-APPELLEES ARIZONA CARDINALS FOOTBALL CLUB, LLC, *ET AL.*

Allen J. Ruby
Jack P. DiCanio
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301

Daniel L. Nash
Nathan J. Oleson
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Suite 1000
Washington, DC 20036

Sonya D. Winner
Patrick R. Carey
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356

Gregg H. Levy
Derek Ludwin
Benjamin C. Block
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001–4956

Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, defendants-appellees state that, except as set out below, no defendant-appellee has a parent corporation. No publicly-held corporation owns more than 10% of any defendant-appellee's stock.

Club Defendants	**Entities**
Arizona Cardinals	Arizona Cardinals Football Club LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership (Baltimore Football Company LLC is the general partner)
Buffalo Bills	Buffalo Bills, LLC
Carolina Panthers	Panthers Football, LLC
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd. (JWJ Corporation is the general partner)
Denver Broncos	PDB Sports, Ltd. (Bowlen Sports, Inc. is the general partner)
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P. (RCM Sports and Leisure, L.P. is the general partner and Houston NFL Holdings G.P., L.L.C. is the general partner of RCM Sports)
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.
Los Angeles Rams	The Los Angeles Rams, LLC
Los Angeles Chargers	Chargers Football Company, LLC

Miami Dolphins	Miami Dolphins, Ltd. (South Florida Football Associates LLC is the general partner)
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, LLC
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	Raiders Football Club, LLC
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
San Francisco 49ers	Forty Niners Football Company LLC
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Team LLC
Tennessee Titans	Tennessee Football, Inc.
Washington Redskins	Pro-Football, Inc. (a subsidiary of WFI Group, Inc., which is a subsidiary of Washington Football, Inc.)

.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Appellants are seven of a group of thirteen former professional football players who, many years after they retired, brought claims against the NFL clubs that had employed them. Their claims addressed the medical care that the players had received while playing. Among the least plausible of their claims – presented only by the seven Appellants here – was an allegation that the clubs had engaged in a RICO conspiracy to injure them in their business or property. According to those plaintiffs, each of them determined through an unidentified "revelation" in 2014 that his football career had been shortened many years before due to the allegedly inadequate medical care that he had received.

In a series of rulings, the district court dismissed or granted summary judgment on all of plaintiffs' claims. In this appeal, Appellants challenge only one of those rulings: the dismissal of their RICO claims on statute-of-limitations grounds.

A plaintiff may know of his injury before he learns all of the facts necessary to allege a RICO cause of action. But the Supreme Court and this Court have long held that the statute of limitations for a RICO claim does not wait for the plaintiff to learn all of those facts – or even to realize that he may have a RICO claim. Instead, the limitations period begins to run no later than the day when the plaintiff first knows (or has reason to know) of his injury. Applying those well-established

precedents, the district court held that, because Appellants unquestionably knew of their alleged business injuries a decade or more before they filed suit, their claims were time-barred under RICO's four-year statute of limitations.

Appellants contend that the limitations period should not have begun until they fully appreciated the *cause* of their alleged injuries. The Supreme Court held otherwise in *Rotella v. Wood*, 528 U.S. 549, 555 (2000), confirming that the statute of limitations accrues as soon as a plaintiff is aware of his injury, regardless of whether he knows its cause. Appellants' alternative argument for tolling the statute of limitations – purported fraudulent concealment – was also properly rejected by the district court, as Appellants failed to allege any (much less all) of the required elements of that theory. In short, whatever other legal problems may exist in attempting to convert complaints about allegedly inadequate medical care into a RICO claim, Appellants' RICO claims are time-barred.

JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2.2, defendants state that they agree with the Jurisdictional Statement in Appellants' Opening Brief.

STATEMENT OF ISSUE PRESENTED

Whether the district court, applying *Rotella v. Wood*, properly dismissed Appellants' RICO claims when it was apparent from the face of their complaint

that each Appellant knew of his alleged injury more than a decade before filing suit.

STATEMENT OF THE CASE

This appeal arises out of a lawsuit in which the district court dismissed or rejected on summary judgment all of the plaintiffs' efforts to challenge the medical care they received while playing professional football decades earlier. Appellants challenge only a single aspect of one of three orders in which the district court granted dismissal or summary judgment on all of their claims.

1. The Original Complaint

This suit, filed in May 2015 in the District of Maryland, initially asserted only state-law intentional misrepresentation claims against the 32 member clubs of the National Football League ("NFL"). Dkt. No. 1.[1] The plaintiffs were thirteen former professional football players who had been employed by some of the defendant clubs at various times in the past.[2] They alleged that club physicians and athletic trainers had adhered to a malign "return to play culture" and treated injured

[1] Record materials not included in Appellants' Excerpts of Record ("ER") are cited herein by reference to the district court docket (*e.g.*, "Dkt. No. __ at __"). The additional orders of the district court that are encompassed in its final judgment are supplied in the Supplemental Excerpts of Record ("SER") filed herewith.

[2] Plaintiff Etopia Evans sued in her capacity as personal representative of the estate of her husband, Charles Evans. This brief continues the convention followed by the parties below of referring to Charles Evans as the plaintiff.

players with painkillers and other medications without disclosing the associated health risks. Plaintiffs alleged that they had suffered further game injuries and/or long-term health effects as a result of such improper medical treatment.

On February 25, 2016, the case was transferred to the Northern District of California.[3] The district court denied a motion to dismiss the complaint on July 1, 2016. Dkt. No. 89.

2. The Amended Complaint

In November 2016, the district court granted plaintiffs leave to file an Amended Complaint. Dkt. No. 122; ER 1. In addition to other amendments, the Amended Complaint asserted, on behalf of seven of the thirteen plaintiffs, a new cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). ER 75-90 ¶¶ 278-326. As the dismissal of this RICO claim on statute of limitations grounds is the only issue presented in this appeal, these seven plaintiffs are referred to herein as "Appellants."[4] Appellants retired from the NFL between 1985 and 2004.

---

[3] Dkt. No. 33. A similar case against the NFL, asserting principally negligence theories, had been previously brought in the Northern District of California and was dismissed on the ground that the claims were preempted by Section 301 of the Labor Management Relations Act. *See Dent v. Nat'l Football League*, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014). The appeal from that dismissal remains pending before this Court.

[4] None of the other six plaintiffs asserted RICO claims. *See* ER 75. The Opening Brief challenges none of the district court's rulings as to those six plaintiffs.

No RICO violation can arise from misdiagnosis of injury, negligent medical treatment, or oral misrepresentations or omissions. Rather, the RICO statute identifies a specific list of "predicate" acts that can be alleged to establish a RICO claim. 18 U.S.C. § 1961(1). Appellants alleged three categories of predicate acts – mail fraud, wire fraud, and violations of the Controlled Substances Act – all in connection with defendants' procurement, administration, and storage of medications. ER 80-88 ¶¶ 299-318.[5] Most of these allegations were presented in general and conclusory terms; few specific predicate acts were even identified, and none was alleged to have directly harmed any Appellant.

RICO does not allow recovery for physical injuries of the kind asserted in the original complaint, but rather permits recovery only for injuries to "business or property." *See Oscar v. Univ. Students Co-Op. Ass'n*, 965 F.2d 783, 785-86 (9th Cir. 1992) (en banc). The Amended Complaint accordingly alleged that the seven Appellants had suffered injuries to their "businesses" because certain physical injuries had shortened their professional football careers, with resulting loss of income both from playing football and from related opportunities. ER 89-90 ¶ 325.

[5] The Amended Complaint also alleged violations of other laws, such as the Food, Drug & Cosmetics Act, but such violations are not eligible for treatment as predicate acts under RICO. *See* 18 U.S.C. § 1961(1).

Although Appellants' theory of causation was obscure, it appeared to run generally as follows: A football player who suffered a training or game injury would seek treatment from his club's medical staff. Instead of prioritizing the player's long-term health, the medical staff would focus on getting him back on the field as soon as possible. To accomplish this objective, a team doctor or athletic trainer would give the player prescription painkillers or other medications that would enable him to return to play but would not properly disclose the long-term health risks of the medications. The player would then suffer a further football injury, which in some cases would leave him so debilitated that he would be forced prematurely to retire from playing football.[6]

The specific allegations bearing on the alleged RICO injuries of each Appellant were as follows:

- **Darryl Ashmore** alleged that while playing for the St. Louis Rams he suffered a "career-ending neck injury" but was kept on the field "through [unidentified] Medications and he was not told of their [unidentified] side effects." ER 62 ¶ 239. He played for several more seasons; his last season was in 2001. ER 7 ¶ 25.

- **Chris Goode**, who played for the Indianapolis Colts (ER 6 ¶ 23), "believe[d] that the Colts were unwilling to re-sign him out of fear of his inability to play the following season" after he suffered a neck injury. ER 60 ¶ 233. He alleged that absent the "pressure[] to return to play" following the neck injury, his career would not have ended in 1993. *Id.*

[6] The complaint also alleged that the medications given to some players had long-term health effects that emerged years later, long after they retired from football. However, no Appellant alleged that any such latent health impacts caused him any "business" injury.

He also alleged that he lost an endorsement deal with Reebok upon his retirement. *Id.*

- **Jerry Wunsch** alleged that he suffered ankle injuries and that, after the last one, a team doctor told him that his ankles were so damaged that he could not return to play. He was cut by the Seattle Seahawks shortly thereafter. ER 64 ¶ 247. His career ended in 2004. ER 7 ¶ 27.

- **Alphonso Carreker** was cut by the Denver Broncos in 1991 because, he "believes," of an "injury to his back that was not given sufficient time to heal. No other team signed him, thus ending his career." ER 63 ¶ 243.

- **Steve Lofton** played for the Arizona Cardinals, Carolina Panthers, and New England Patriots; his career ended in 1999. ER 8 ¶ 31. The complaint did not specify which of these clubs his RICO claim was directed against. He alleged generally that "if the major injuries he suffered had been given time to heal, and had not been masked by painkillers, he would have had a longer playing career." ER 66 ¶ 252.

- **Duriel Harris** had a heart condition of unspecified cause. ER 67-68 ¶ 257. He alleged that because of this condition, for which the Dallas Cowboys required him to sign a waiver, he was "afraid to exert himself maximally for fear he would have a heart attack," and that this "[was] ultimately . . . a reason his career ended," along with an ankle injury that "was not given sufficient time to heal." ER 68 ¶ 258. His career ended in 1985. ER 8-9 ¶ 33.

- Etopia Evans, suing on behalf of the estate of **Charles Evans**, ER 4 ¶ 15, asserted a RICO claim but alleged no facts indicating that he suffered injury to his business or property as a result of medical treatment received during his playing days. Evans, who played for the Minnesota Vikings and Baltimore Ravens, retired in 2000 and died in 2008. *Id.*; ER 57 ¶ 224.

Each of the Appellants (other than Evans and Lofton) identified one to three isolated occasions when he was given a controlled substance under circumstances that Appellants apparently contend would have constituted a technical violation of the Controlled Substances Act. ER 81-83 ¶ 303. For example, Carreker alleged

that he was once given a Vicodin in a visiting team locker room after an away game (rather than at his club's training facility) and that the medication was handed to him by an athletic trainer rather than the club doctor. ER 82.[7] But neither Carreker nor any of the other Appellants alleged a causal connection between any such alleged technical violation and any career-ending injury; indeed, none of these events was alleged to have caused any harm at all.

No Appellant alleged any instance of mail or wire fraud that affected, much less harmed him.

Each Appellant sought to recover not just from the NFL club to whose medical staff he attributed his alleged business injury, but also from all other NFL clubs, on the theory that the alleged wrongful conduct as to him was the result of a "conspiracy." ER 88 ¶ 319. However, no facts were alleged to establish the existence of an *agreement* among the defendants to commit mail or wire fraud or to violate the Controlled Substances Act – or, for that matter, any other law.

In obvious recognition of the fact that their RICO claims were on their face time-barred, each Appellant alleged, in identical conclusory terms, that he "did not become aware that Defendants caused [his] injuries until, at the earliest, March of

[7] Neither this nor the other such incidents alleged in the Amended Complaint violated the Controlled Substances Act, but the district court was not required to resolve that question, and this Court need not do so either.

2014." *E.g.*, ER 5 ¶ 16, ER 6 ¶ 24. However, no allegations of fact were presented concerning any "new revelation" (Op. Br. at 1) that any Appellant received at that time. Nor did the Amended Complaint describe any effort made by any Appellant at any prior time to determine what had caused his alleged injuries.

3. The District Court's Order Dismissing Most of the Amended Complaint

Defendants moved to dismiss the Amended Complaint, asserting (a) that the RICO claims were barred by the four-year statute of limitations and (b) that Appellants had failed to plead any facts to suggest that their alleged injuries had been proximately caused by any RICO predicate act. ER 109. Defendants also moved to dismiss all of the state-law intentional misrepresentation and concealment claims, as well as the conspiracy allegations, as insufficiently pled under governing law. *Id.*

On February 3, 2017, the district court granted the motion to dismiss in substantial part. ER 282.

RICO/Statute of Limitations. The district court held that Appellants' RICO claims were "plainly barred by the statute of limitations." ER 285.[8] Beginning

[8] The district court assumed *arguendo* (as had defendants' motion) that the allegation that Appellants' careers had been "shortened" by their physical injuries, with accompanying "diminish[ment of] their post-NFL prospects," qualified as injuries to business or property within the meaning of RICO. ER 285; *see* ER 122. That question was accordingly reserved below and is not presented in this appeal.

with the Supreme Court's holding that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock" for the statute of limitations under RICO, ER 286 (quoting *Rotella*, 528 U.S. at 555), the court pointed out that:

> [p]laintiffs' specific allegations – that the clubs pressured them to play and gave them medications to continue playing, that they thus did not fully heal from injuries, and that the toll thereof on their health "shortened" their NFL careers – are all of facts plaintiffs knew or should have known as soon as they occurred.

ER 286. Similarly, the court observed, "plaintiffs knew or should have known that both shortened NFL careers and career-ending injuries would diminish their post-NFL prospects." *Id.* When each plaintiff sustained the injury that allegedly ended his NFL career, he "'had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [injury].'" *Id.* (quoting *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001)).

The district court rejected Appellants' assertion that they could not have known before 2014 that the clubs' alleged conduct caused their alleged career-ending injuries; that contention, the court stated, "beggars belief." ER 288. It was also irrelevant: "At best," the district court recognized, "plaintiffs' position boils down to arguing that the limitations period could not start running until they not only discovered that they had suffered injuries to business or property due to the clubs' alleged conduct, but also stumbled onto a legal theory fitting those facts."

Id. Any such argument, the court concluded, would be "contrary to controlling law." *Id.* (citing *Rotella*, 528 U.S. at 555-57).

The court also rejected Appellants' argument that the statute of limitations had been tolled under the doctrine of fraudulent concealment, as the complaint lacked the allegations necessary to support any such theory and failed to demonstrate that Appellants had "used due diligence in trying to uncover the facts" on which their claims were based. ER 289-90 (quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987)).

Conspiracy Allegations. Because the RICO claims of all seven Appellants were dismissed on statute of limitations grounds, the district court found it unnecessary to reach defendants' alternative challenges to those claims. But the district court did address "the amended complaint's failure to plead allegations showing a [RICO] conspiracy … within the context of plaintiffs' conspiracy claim." ER 291.

The district court held that the Amended Complaint fell far short of satisfying the pleading requirement for an allegation of conspiracy. "Looking at the amended complaint as a whole," the court found, "plaintiffs' extensive allegations warrant no inference of any conspiracy but remain entirely consistent with a standalone team-by-team return-to-play culture consistent with a non-collusive yet burning desire by each team to win and attract audiences by keeping

their best players, even when injured, on the field." ER 299. It was not enough, the court pointed out, for plaintiffs merely to allege "that the clubs collectively make up the NFL," as their "[a]greeing to form the NFL does not translate to further agreeing to subordinate plaintiffs' health and safety to returning them to play at all costs. The amended complaint contains no well-pled allegations of any conspiracy between clubs regarding the latter." ER 300.

Although Appellants' Opening Brief repeatedly asserts that defendants "conspired" (*see, e.g.*, Op. Br. at 3), it does not challenge this holding.

Intentional Misrepresentation Claims. The district court found that, with only a few exceptions, "the amended complaint contains only general or conclusory allegations, or allegations insufficient to plead intentional misrepresentation or concealment *under any theory* with the particularity required by Rule 9(b)." ER 297 (emphasis added). The misrepresentation and concealment claims – including most of Appellants' state-law claims for the same injuries on which they based their RICO claims – were accordingly dismissed, with leave to amend. ER 300. Appellants do not challenge this ruling.

4. Subsequent Pleadings and Orders

Plaintiffs filed a Second Amended Complaint, re-pleading their dismissed misrepresentation and concealment claims. Dkt. No. 189. Defendants moved to dismiss the re-pled claims, asserting that they still failed to satisfy Rule 9(b). Dkt.

No. 212. In the alternative, with discovery by this time substantially complete, defendants moved for summary judgment on the ground that nearly all of the state-law claims were barred by the statute of limitations. *Id.* On May 15, 2017, this motion was granted. SER 10.

After finding the Second Amended Complaint still insufficient as to most of the previously dismissed state-law claims, SER 14-21, the court turned to defendants' motion for summary judgment on the surviving claims. The parties agreed that the Maryland statute of limitations applied and that under the Maryland discovery rule, "the limitations period starts running 'when the plaintiff has knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged tort.'" *Id.* (quoting *Lumsden v. Design Tech Builders, Inc.*, 749 A.2d 796, 802 (Md. Ct. App. 2000)). The court observed that most of the surviving misrepresentation and concealment claims were "predicated on damages supposedly attributable to musculoskeletal injuries sustained" during plaintiffs' playing careers. SER 22. Those musculoskeletal injuries were plainly known to each plaintiff when they occurred, thus triggering the duty to investigate under Maryland law.

Indeed, pointing to undisputed facts presented for the first time on summary judgment, the court found that, far from being unaware of their injuries until the

year before this suit was filed, "most of the plaintiffs … [had] filed workers' compensation claims for the very same injuries they assert here." *Id.*[9] It was thus plain on the undisputed record that Appellants not only knew long ago of their injuries but had also attributed them long ago to their club employers.

The district court's May 15, 2017 order disposed of almost all of the state-law claims, either dismissing them for the second time as inadequately pled or granting summary judgment based on the statute of limitations. Appellants have not challenged any aspect of that order in this appeal. On July 21, 2017, the district court granted summary judgment on the few remaining claims based on workers' compensation exclusivity; that ruling is similarly not challenged here. SER 1.

The court entered final judgment on July 22, 2017. Dkt. No. 253. With respect to the seven Appellants, the judgment encompassed the following holdings:

- The RICO claims of all Appellants were dismissed based on the four-year statute of limitations.
- The conspiracy claims and allegations of all Appellants were dismissed based on inadequate pleading.

[9] Each Appellant (other than Evans, who died in 2008) had filed such a claim by 2010; most filed claims much earlier. Thus, *at least* five years before the complaint in this case was filed each of these Appellants had attributed the physical injuries of which he complains in this case (including the physical injuries to which he attributes his alleged "business" injuries) to his employment by one or more of the defendants. *See* Dkt. No. 212 at 18-24; Dkt. No. 213-15; Dkt. No. 213-19; Dkt. No. 213-21; Dkt. No. 213-34; Dkt. No. 213-37; Dkt. No. 213-43.

- The state-law misrepresentation and concealment claims of Evans, Goode, and Lofton – including those based on the same injuries on which their RICO claims were based – were dismissed pursuant to Rules 9(b) and 12(b)(6).

- The state-law misrepresentation and concealment claims of Harris that paralleled his RICO claim were also dismissed under Rules 9(b) and 12. The court granted summary judgment on Harris's unrelated claim against another club for which he had played earlier in his career; no "business" injury was alleged in connection with that claim.

- The state-law misrepresentation and concealment claims of Carreker that paralleled his RICO claim were dismissed under Rules 9(b) and 12. The district court granted summary judgment based on workers' compensation exclusivity on an unrelated claim involving a heart ailment suffered in 2013; Carreker alleged no "business" injury associated with that ailment.

- The court entered summary judgment for defendants based on the statute of limitations on the state-law misrepresentation and concealment claims of Ashmore and Wunsch that paralleled their RICO claims. Their unrelated misrepresentation and concealment claims (relating to events not claimed to be associated with business injuries) were dismissed under Rules 9(b) and 12.

Of these holdings, only the first – the dismissal of Appellants' RICO claims on statute of limitations grounds – is challenged in Appellants' Opening Brief.

STANDARD OF REVIEW

1. Appellants are correct that the standard of review is *de novo* for the dismissal under Rule 12 of their RICO claims on statute of limitations grounds. Op. Br. at 7; *see Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936, 939 (9th Cir. 2017).

2. Appellants are *not* correct in their description of the Rule 12 standard applicable to defendants' motion to dismiss. *See* Op. Br. at 7-8. It is well

established that a complaint should be dismissed when it is "apparent from the face of the complaint" that the claims are time-barred, even though the defense is an affirmative one. *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980); *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007); *see also Jones v. Bock*, 549 U.S. 199, 215 (2007) ("If the allegations … show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim....").

When, as in this case, the limitations period has clearly run, this Court has repeatedly reiterated that the burden is on the plaintiff to allege facts sufficient to warrant tolling. *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). And when a plaintiff seeks tolling based on an allegation of fraudulent concealment, the required elements of fraudulent concealment must be pled with particularity. *Grimmett*, 75 F.3d at 514; *see also 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir. 1999). In addressing the statute of limitations, as with any other issue, a court is not required to accept as true allegations "that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013) (quoting *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir.

2010)); *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

None of the decisions cited by Appellants is to the contrary; none relieved a plaintiff of the obligation to plead *facts* sufficient to avoid the statute of limitations when it was otherwise apparent from the face of the complaint that his claim was time-barred. For example, in *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995), on which Appellants principally rely, the Court merely held that the lower court had erred in dismissing a complaint on statute of limitations grounds when the plaintiff had pled facts sufficient to establish a *prima facie* basis for equitable tolling. *Id.* at 1207-09. Neither *Supermail Cargo* nor any of Appellants' other cases permitted a plaintiff to rest on mere conclusory assertions, unsupported by any allegations of fact, to avoid a time bar that was plain from the face of the complaint.

3. Appellants are deemed to have waived any challenge to the district court's holdings that is not "specifically and distinctly" argued in their Opening Brief. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005); *see also Sarver v. Chartier*, 813 F.3d 891, 906 n.10 (9th Cir. 2016) (because appellant "failed in his opening brief to argue any error concerning the dismissal of his breach of contract, fraud, and negligent misrepresentation claims, he has waived such arguments on appeal"); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129-30 (9th

Cir. 2012) (issue not raised in appellant's opening brief was "not properly before" the appellate court).

SUMMARY OF ARGUMENT

Appellants have confined their appeal to what is perhaps the least plausible of their claims – namely, their effort to bootstrap allegations of personal injury into an allegation of injury to "business or property" under RICO. Leaving aside a host of other problems with this theory, the district court's dismissal of Appellants' RICO claim as time-barred was plainly correct.

Appellants attempted to convert their alleged personal injuries into RICO injuries by asserting that physical injuries led to the shortening of their professional football careers, with associated loss of income and other business opportunities. Even assuming *arguendo* that such a far-fetched theory is viable under RICO, Appellants' claims are plainly foreclosed by the statute of limitations. Appellants brought this suit in 2015 – more than a *decade* after each of them stopped playing professional football. That fact is apparent from the face of the complaint and not susceptible to reasonable dispute. Appellants' RICO claims were accordingly time-barred under the four-year statute of limitations.

Appellants' argument that the statute of limitations should not apply because they were unaware before 2014 that defendants were responsible for their alleged injuries is foreclosed by Supreme Court and Ninth Circuit precedent. The Supreme

Court has rejected the argument that the limitations period for a RICO claim should not begin to run until the plaintiff knows that his injury is a *RICO* injury, establishing instead a rule that the statute of limitations begins to run as soon as the plaintiff discovers the injury itself. Here, Appellants do not and cannot claim that they were unaware of their "career-ending" physical injuries when those physical injuries allegedly ended their careers. The statute of limitations thus began to run (at the very latest) when their careers ended, foreclosing their effort to convert those personal injuries into newly actionable RICO injuries a decade or more after the fact.

Appellants cannot escape this problem by invoking "fraudulent concealment." Their allegations do not satisfy any (much less all) of the elements of this Circuit's well-established standard for pleading fraudulent concealment. The district court's holding on the statute of limitations – the only ruling challenged in this appeal – should accordingly be affirmed.

ARGUMENT

To establish a RICO claim, a plaintiff must demonstrate that the defendants (1) conducted (2) an enterprise (3) through a pattern of racketeering activity consisting of two or more related "predicate acts" in violation of specified criminal laws, (4) with resulting injury to the plaintiff's "business or property." *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005);

see 18 U.S.C. § 1964(c). Personal injuries, including physical injuries, are not compensable under RICO, which permits recovery only for injuries to "business or property." *Oscar*, 965 F.2d at 785-86; *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990); *see also Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir. 1988). And a RICO plaintiff may recover only for business or property injuries that are proximately caused by a RICO predicate act. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006).

RICO claims are subject to a four-year statute of limitations, which begins to run on the day that a plaintiff knows (or should know) of his injury, regardless of whether he knows at that time that the injury might have been caused by a RICO predicate act. *Rotella*, 528 U.S. at 554; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987); *Pincay*, 238 F.3d at 1109.

I. The District Court Properly Dismissed Appellants' RICO Claims on Statute of Limitations Grounds.

The most recent season in which any Appellant was employed to play football for an NFL club was 2004. Assuming *arguendo* that the ending of a playing career constitutes a "business" injury, any such injury was known to each Appellant more than a decade before this lawsuit was filed, and in most cases

much earlier than that. The district court correctly held that Appellants' RICO claims were therefore "plainly barred by the statute of limitations." ER 285.

A. The District Court Correctly Applied the Injury Discovery Rule.

All of the "business" injuries alleged by Appellants consisted of – or flowed directly from – the ending of their NFL careers due to on-field injuries. Each Appellant unquestionably knew when his physical condition caused his professional football career to end, and the Amended Complaint identified the year when this occurred as to each Appellant.

1. Appellants argue that the limitations period did not begin to run when their respective football careers ended because, although each of them knew that his playing career was over, he did not then know that this injury had been caused by a "conspiracy to defraud [him]." Op. Br. at 14. The Supreme Court rejected precisely this argument in *Rotella v. Wood*, holding that the limitations period begins running for a RICO claim the moment a plaintiff knows of his injury, even if he has no idea that it was caused by conduct that constitutes a RICO violation. 528 U.S. at 555; *see also Grimmett*, 75 F.3d at 515 ("The limitations period does not toll simply because a party is ignorant of her cause of action.") (citations omitted).

In *Rotella*, the Supreme Court considered whether the limitations period should begin running under the "injury discovery" rule, which focuses exclusively

on when a plaintiff learns of his injury, or instead under the "injury and pattern discovery" rule, under which the limitations period does not begin to run until the plaintiff learns of *both* his injury *and* the predicate acts ("pattern") of racketeering that allegedly caused that injury. 528 U.S. at 553-54. The Supreme Court explicitly rejected the "injury and pattern" rule, holding that the RICO statute of limitations begins to run no later than the actual or constructive discovery of the injury. *Id.* at 554 & n.2.

The plaintiff in *Rotella* had been admitted to a mental hospital in 1985 and was discharged in 1986. He did not learn until 1994 that the hospital's parent company and one of its directors had pled guilty to charges of criminal fraud; he then filed suit, claiming that the defendants had "improperly conspir[ed] to admit, treat, and retain him" at the hospital "for reasons related to their own financial interests rather than the patient's psychiatric condition," a fact that he claimed not to have learned until the defendants' fraud was later revealed. *Rotella v. Wood*, 147 F.3d 438, 439 (5th Cir. 1998), *aff'd*, 528 U.S. 549 (2000). The Supreme Court held that, because Rotella indisputably knew of his injury (his hospitalization) no later than 1986, the fact that he did not learn until 1994 of the fraudulent conduct that made his injury actionable under RICO was insufficient to salvage his claim.

In reaching this conclusion, the Supreme Court drew an analogy to cases involving claims of medical malpractice. In such cases, the Court explained, "[a]

person suffering from inadequate treatment is … responsible for determining within the limitations period then running whether the inadequacy was malpractice." *Rotella*, 528 U.S. at 556. The Court concluded:

> We see no good reason for accepting a lesser degree of responsibility on the part of a RICO plaintiff…. [A] pattern of predicate acts may well be complex, concealed, or fraudulent. But identifying professional negligence may also be a matter of real complexity, and its discovery is not required before the statute starts running…. A RICO plaintiff's ability to investigate the cause of his injuries is no more impaired by his ignorance of the underlying RICO pattern than a malpractice plaintiff is thwarted by ignorance of the details of treatment decisions or of prevailing standards of medical practice.

Id. at 556-57.

The Supreme Court's analogy to the discovery rule as applied in medical malpractice cases is particularly apt here. Appellants' theory of causation rests on the contention that each of them suffered physical injury (and resulting "business" injury) as a result of inadequate or otherwise improper medical treatment. Under the discovery rule as applied by the Supreme Court, the limitations periods on Appellants' claims lapsed long before this suit was brought.

2. This Court was applying the injury discovery rule even before *Rotella*. *See* 528 U.S. at 553. For example, in *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984) (overruled on other grounds), the plaintiff alleged that the defendants had engaged in a conspiracy that caused him to lose his yacht. The loss of the yacht

occurred in 1977, but the plaintiff alleged that he did not learn of the conspiracy until 1980. This Court affirmed the dismissal of the RICO claim as time-barred, holding that the plaintiff's knowledge of his injury in 1977 was sufficient to trigger the statute of limitations even if he did not learn until later of the conspiracy that had caused it. *Id.* at 1433.

In *Grimmett v. Brown*, the plaintiff alleged that the defendant had assisted her former husband in committing fraud by placing his business, in which the plaintiff had an interest, into bankruptcy. Although the plaintiff promptly filed a complaint in the bankruptcy court in May 1989 challenging the proposed reorganization, she claimed that it was not until December 1990 that she learned that the bankruptcy had been part of a broader fraudulent scheme. 75 F.3d at 509-11. She argued that the statute of limitations began to run only with this later revelation. Rejecting that argument, this Court held that, because the plaintiff had known of her business injury when she filed her bankruptcy complaint in 1989, her RICO claim – which she had filed in November 1994 – was time-barred. *Id.* at 511-12.

Similarly, in *Pincay v. Andrews*, this Court held that the statute of limitations barred a RICO suit (based on predicate acts of mail and wire fraud) brought by two professional jockeys against their former investment advisor, who had put their money into investments that paid him excessive fees. 238 F.3d at 1109-1110.

Observing that the fees were disclosed in documents that had been provided to the plaintiffs more than four years earlier, this Court held that the plaintiffs had at least constructive knowledge of their injury at that time. *Id.* at 1110.

This Court recently applied the injury discovery rule again in *Crown Chevrolet v. General Motors, LLC*, 637 F. App'x 446 (9th Cir. 2016), affirming the dismissal on statute of limitations grounds of the plaintiff's claim that he had been forced to sell his automobile dealerships as a result of a RICO violation. The sale had occurred more than four years before suit was brought; the claim was accordingly barred, and "[i]t does not matter that Crown did not know that 'it was being *forced* to sell because of wrongful financial pressure.'" *Id.* at 446 (citing *Rotella*, 528 U.S. at 554-55; and *Grimmett*, 75 F.3d at 510) (emphasis in original).

3. The decisions cited by Appellants are not to the contrary. In *Living Designs*, the plaintiffs claimed that they had been fraudulently induced to settle a product liability lawsuit involving crop damage when the defendant withheld critical evidence. 431 F.3d at 358. Significantly, the "injury" in that case was not the original crop damage but rather the allegedly tainted settlement. *Id.* at 364. The only issue presented to this Court on the statute of limitations was whether the plaintiffs had constructive notice of that injury when the defendant was sanctioned in another case, thus arguably triggering an obligation to investigate. *Id.* at 365-66. A triable issue of fact existed, not because the plaintiffs lacked knowledge of the

cause of their injury, but rather because they arguably *did not know that they had been injured at all*. Nothing in *Living Designs* purported to overrule or modify the injury discovery rule as set forth in *Rotella*.

Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271 (9th Cir. 1988), also does not support Appellants' position. In that case, a company sued a former employee who had engaged in a kickback scheme. Appellants focus on the Court's statement that the plaintiff's claim accrued when the company "had actual or constructive knowledge of the fraud." *Id.* at 275; *see* Op. Br. at 11. But Appellants overlook the fact that it was not until the company knew of the fraud that it knew it had been injured at all. Nothing in *Beneficial* suggests that accrual of the claim for statute of limitations purposes would have been delayed if the company had learned of its injury but not of the fraud that had caused it. If and to the extent that *Beneficial* would be susceptible to such a reading, it would have been overruled by *Rotella*.

Appellants' reliance on the unpublished district court decision in *Ward v. Chanana*, 2008 WL 5383582 (N.D. Cal. Dec. 23, 2008), is also misplaced. As the district court here correctly observed, insofar as *Ward* can be interpreted (as Appellants propose) to delay accrual until a plaintiff knows that his injury was caused by a RICO violation, that would be "inconsistent with the Supreme Court's instruction in *Rotella* that 'discovery of the injury, not discovery of the other

elements of a claim, is what starts the clock' for RICO claims." ER 288 (quoting *Rotella*, 528 U.S. at 555).

4. The Supreme Court was unambiguously clear in *Rotella* that special statute of limitations rules do not apply when the injury has been caused by an allegedly hidden fraud that does not come to light until later. Indeed, that was the fact pattern in *Rotella* itself – the plaintiff knew of his hospitalization (his injury) but did not know until later that his hospitalization and treatment were the result of a fraudulent scheme. His claim was nonetheless time-barred. The Supreme Court expressly considered – and rejected – the argument that a different accrual rule should be employed for cases involving allegations of fraud. 528 U.S. at 557.

In short, once a plaintiff knows of the injury, he has four years – and no more – to investigate and bring his claim, even if it is difficult to ascertain the cause of the injury. *Id*. at 556-57, 560. Appellants' RICO claims were accordingly time-barred.

B. Appellants Knew of Their Alleged Business Injuries Long Ago.

No plausible interpretation of the complaint would permit an inference that any Appellant was unaware of his alleged business injury – the ending of his playing career – when it happened. Indeed, the allegations of the complaint make clear that each Appellant was also aware at that time of what he contends to have been the immediate cause of that injury: a physical injury that made it impossible

for him to continue to play. *See, e.g.*, ER 64 ¶ 247 (allegation by Wunsch that a doctor told him that his ankles were so damaged that he could not return to play); ER 60 ¶ 233 (allegation by Goode that the Colts did not re-sign him because of a neck injury). It is difficult to imagine any situation in which contemporaneous knowledge of injury could be less in question than one in which a plaintiff claims to have suffered a physical injury so severe as to leave him unable to continue in his chosen profession.[10]

Under the guise of a "notice" argument, Appellants try to redefine "injury" as encompassing both the alleged harm and the *cause* of that harm. Thus, Appellants seek to distinguish "between the *cause* of their business injuries – the conspiracy to defraud, which they did not learn of until March 2014 – and the normal 'wear and tear' to be expected with playing professional football, about which they did know." Op. Br. at 13 (emphasis added). *Rotella* forecloses any such transparent effort to extend the limitations period. *See* 528 U.S. at 559 ("A limitations period that would have begun to run only … years after a claim became

[10] Appellants argue that "it is impossible to conclude from this complaint alone that Plaintiffs had actual knowledge that they had failed to fully heal for every injury they suffered while playing in the NFL and about which they complain of here." Op Br. at 15-16. No such conclusion is required. The only question in this appeal is whether Appellants had contemporaneous knowledge of their alleged *business* injuries – i.e., their loss of employment as professional football players. No Appellant claims to have been unaware until four years before this suit was filed that his professional football career was over.

ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability."). The plaintiff in *Rotella* similarly claimed that he had not initially known that his hospitalization was the result of a fraudulent conspiracy rather than a genuine medical diagnosis. *See id.* The Supreme Court held that his knowledge of the hospitalization alone was sufficient to start the clock on the statute of limitations. The same result obtains here.

Appellants' argument about "notice" also ignores the undisputed fact that each of them *did* know at least the direct cause of his loss of employment: a physical injury that made him unable to continue to perform on the field, notwithstanding medical treatment that he now claims was knowingly substandard. This is no different from the medical malpractice context from which the Supreme Court drew its RICO accrual rule: A medical malpractice claim accrues as soon as the plaintiff knows that he is not well, even if he has no idea that his condition is the doctor's fault. At that point, "[a] person suffering from inadequate treatment is … responsible for determining within the limitations period then running whether the inadequacy was malpractice." *Id.* at 556.

Nor can Appellants avoid the statute of limitations by suggesting that some of their derivative injuries – such as loss of future coaching opportunities – might

not have been fully known to them when their playing careers ended.[11] None of the Appellants alleged *any* new business injury that he suffered in the four years preceding the filing of this lawsuit. In any event, this Court has made clear that once a plaintiff has suffered *any* business injury from a RICO violation, the limitations clock is not re-set by new injuries that flow from the same conduct; a separate limitations period applies to additional injuries only if they are caused by a "new and independent act" by the defendant. *Grimmett*, 75 F.3d at 513; *see also Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987) (statute of limitations may only be "restart[ed]" by a "*new and independent act* that is not merely a reaffirmation of a previous act" and inflicts a new injury) (emphasis added). No Appellant claims to have had *any* interaction with *any* defendant within the limitations period, much less one entailing a "new and independent" wrongful act that caused him new injury.

[11] In apparent contradiction of their original theory about such other injuries, Appellants now argue that "[i]t does not naturally follow that a shortened career would have any impact on a player's ability to, *e.g.*, coach at some future date – without more, the two simply have nothing to do with each other ...." Op. Br. at 18. Without such a link – a shorter playing career making a coaching or other opportunity less likely – the complaint alleges no conceivable causal connection between the medical treatment an Appellant received while playing and his later inability to pursue a coaching career or other business opportunity. Either way, any claim relating to such injuries would be subject to the same limitations period.

C. Appellants' Fraudulent Concealment Argument Is Both Inconsistent With Applicable Law and Unsupported By the Allegations of the Complaint.

Fraudulent concealment "is properly invoked only if a plaintiff establishes affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Volk*, 816 F.2d at 1415 (citation and internal quotation marks omitted). Failure to plead with particularity facts demonstrating fraudulent concealment "waives this tolling defense" to the statute of limitations. *Grimmett*, 75 F.3d at 514; *see also Volk*, 816 F.2d at 1415-16; *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012); *Rutledge*, 576 F.2d at 250.

Fraudulent concealment is not established merely because the underlying claim asserts fraud. Rather, fraudulent concealment focuses on whether the defendant took separate affirmative steps to prevent the plaintiff from learning that he had a claim. *Volk*, 816 F.2d at 1416. The plaintiff must plead with particularity that: (1) the defendant took affirmative action to mislead the plaintiff about the existence of his claim; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to the claim; and (3) the plaintiff acted diligently in trying to uncover those facts. *See Hexcel*, 681 F.3d at 1060. None of these elements was pled here.

1. The Amended Complaint does not allege any conduct – let alone affirmative conduct – by defendants to conceal from Appellants the existence of their claims. *See Grimmett*, 75 F.3d at 514-15 ("fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant *actively* misled her" about her claim) (emphasis in original). Mere "silence or passive conduct" is insufficient to establish this element. *Volk*, 816 F.2d at 1416 (rejecting claim of fraudulent concealment based on failure to disclose material information). Appellants accordingly cannot rely for this element on defendants' mere alleged failure to disclose to them the elements of their claims.[12]

Furthermore, this first element may not be established absent an allegation of conduct "*above and beyond* the wrongdoing upon which the plaintiff's claim is filed." *Guerrero v. Gates*, 442 F.3d 697, 707 (9th Cir. 2006) (citation omitted, emphasis in original); *see also Volk*, 816 F.2d at 1416 (actions that were merely a "means for the execution of the [underlying] fraud" could not be relied upon as a

[12] Appellants argue that this rule does not apply to information the defendant has a duty to disclose. Op. Br. at 21 (citing *Rutledge*, 576 F.2d at 250). But Appellants identify no undisclosed information that was both (a) subject to such a duty and (b) needed to support their RICO claims. Appellants focus on allegedly undisclosed information about the side effects of medications they received from team doctors and trainers. Op. Br. at 23. But Appellants do not allege that such side effects caused the "business" injuries on which their RICO claims are based. Nor do they explain how a failure to disclose such risks could have constituted an effort to conceal Appellants' RICO claims.

basis for asserting fraudulent concealment of that fraud); *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1052 (9th Cir. 2008) (rejecting claim of fraudulent concealment based on same allegations as the plaintiffs' cause of action). Appellants offered no allegations identifying conduct above and beyond the alleged wrongdoing on which their claims were based that actively concealed from them the existence of their claims.

2. Appellants similarly failed to allege the second element of fraudulent concealment – absence of actual or constructive notice of the facts necessary to the cause of action. A claim of fraudulent concealment fails if a plaintiff has even *constructive* notice of his cause of action through possession of "enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Hexcel*, 681 F.3d at 1060 (citation omitted); *see Pincay*, 238 F.3d at 1110 (rejecting fraudulent concealment claim when plaintiffs had received constructive notice through written disclosure of the pertinent facts).

Here, the complaint was replete with allegations demonstrating Appellants' contemporaneous knowledge of virtually all the facts on which they based their allegations of RICO violations. *See, e.g.*, ER 24-34, 59-66, 81-82 (alleging Appellants' receipt of pills on airplanes, in visitor locker rooms, in unmarked containers, without prescriptions, and/or without identifying the names of the medications). Indeed, Appellants have consistently contended that the conduct

they challenge occurred "in *open* violation of federal law." *See* ER 176 (emphasis added). Thus, it cannot reasonably be disputed that Appellants, with clear knowledge of their alleged injuries, were years ago on at least *constructive* notice of the RICO violation they now allege. Appellants have identified no facts necessary to the assertion of their claims that became available to them only in 2014.

3. The Amended Complaint was entirely silent on the third required element for pleading fraudulent concealment: due diligence. *Hexcel*, 681 F.3d at 1060; *see Rotella*, 528 U.S. at 560-61 (tolling requires showing that "a pattern [of racketeering] remains obscure in the face of a plaintiff's diligence in seeking to identify it"). As the Supreme Court has made clear, an absence of diligence in investigating a potential RICO claim is alone sufficient to preclude any argument of fraudulent concealment. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997). Facts demonstrating the required diligence must be pled with particularity. *Rutledge*, 576 F.2d at 250 (a plaintiff must, *inter alia*, "state facts showing his due diligence in trying to uncover the facts"); *see also Volk*, 816 F.2d at 1415-16 (same).

The Amended Complaint does not allege that any Appellant made *any* effort to discover the cause of his alleged injury in the many years since the end of his

playing career. This fact alone is sufficient to defeat Appellants' fraudulent concealment argument. *Klehr*, 521 U.S. at 194.[13]

D. Having Waived Any Challenge to the District Court's Dismissal of Their Conspiracy Allegation, Appellants Cannot Rely on That Allegation to Salvage Their RICO Claims.

Appellants' theories of delayed accrual and fraudulent concealment based on their supposed 2014 "revelation" that they were the victims of a "fraudulent conspiracy" fail for an additional independent reason: The district court held, in a ruling that Appellants' Opening Brief does not challenge, that Appellants failed to adequately plead the existence of any such conspiracy.

Appellants assert that "[t]he District Court was required to accept … as true" their allegation that their receipt of medications "was part of a conspiracy to defraud and injure them." Op. Br. at 14. But their brief does not even acknowledge, much less offer reasoned argument to challenge, the district court's holding that this allegation failed to satisfy the well-established pleading standard for conspiracy. Rather than discussing any of the Supreme Court and Ninth Circuit

[13] Appellants do not argue in their Opening Brief that the district court should have offered them leave to amend their complaint to add additional allegations on fraudulent concealment. Any such argument would necessarily have failed, as they never identified facts that they *could* have alleged to satisfy the standard. To the contrary, the undisputed record shows that Appellants had enough knowledge about their injuries to attribute them to defendants in workers compensation claims filed many years before this suit was brought. *See* p. 14 & n. 9 above.

authorities on that point,[14] Appellants instead cite only *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008), a case about the interpretation of insurance contracts that has nothing to do with allegations of conspiracy, the statute of limitations, RICO, or any other issue in this case. *See* Op. Br. at 14.

It is black-letter law that in failing to challenge the district court's holding on this issue in their Opening Brief, Appellants have waived any such challenge. *Sarver*, 813 F.3d at 906 n.10; *see Kama*, 394 F.3d at 1238 (all arguments waived that are not "specifically and distinctly" presented); *Tri-Valley CAREs*, 671 F.3d at 1129-30 (same). Appellants may not re-introduce their dismissed conspiracy allegation through the back door by citing it in support of their argument on the single issue they have chosen to pursue.

[14] *See, e.g.*, *Twombly*, 550 U.S. at 555 (a plaintiff seeking to plead the existence of a conspiracy must plead concrete facts to support a plausible conclusion that the defendants' conduct was the result of coordinated, rather than unilateral, action); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1198 (9th Cir. 2015) (same); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1045 (9th Cir. 2008) (same).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Sonya D. Winner

Allen J. Ruby
Jack P. DiCanio
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301

Daniel L. Nash
Nathan J. Oleson
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Suite 100
Washington, DC 20036

Sonya D. Winner
Patrick R. Carey
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356

Gregg H. Levy
Derek Ludwin
Benjamin C. Block
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956

Attorneys for Defendants-Appellees Arizona Cardinals Football Club, LLC, et al.

May 9, 2018

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases pending in this Court that are not listed by Appellants in their Statement of Related Cases.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16693

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [9,052] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant [/s/ Sonya D. Winner] Date [5/9/2018]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 9, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Sonya D. Winner
Sonya D. Winner

May 9, 2018